United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2591

To be argued by
ROBERT J. SISK

United States Court of Appeals
FOR THE SECOND CIRCUIT

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No. 74-2591

ALBERT KAUFMANN,
Plaintiff-Appellant,

P/S

against

MARY WELLS LAWRENCE, CHARLES MOSS, RICHARD T. O'REILLY, JOHN V. BURNS, FRANK G. COLNAR, FREDERICK L. JACOBS, BARRY E. LOUGHRANE, MARTIN STERN, STANLEY G. DRAGOTI, CATHERINE GIBSON, E. DONALD CHALLIS, and WELLS, RICH, GREENE, INC.,
Defendants-Appellees,

and

WARREN J. KRATKY, ARNOLD M. GRANT, TROY V. POST, and EMILIO PUCCI,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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Preliminary Statement

This brief is submitted by the defendants-appellees in opposition to an appeal from an order of the United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, denying the motion of plaintiff-

appellant Albert Kaufmann for a preliminary injunction against an Exchange Offer by defendant-appellee Wells, Rich, Greene, Inc. ("WRG" or the "Agency") to its shareholders. Judge Carter's opinion, which is not yet officially reported, may be found in the Joint Appendix (720a-735a)* and at ¶94,908 of the CCH Federal Securities Law Reporter.

Issues Presented

1. Whether appellant's appeal is moot since the Exchange Offer he sought to enjoin in the District Court has been consummated.

2. Whether appellant is barred from seeking relief in this Court which is wholly different from the relief sought in the District Court and which is dependent on the resolution of factual issues not litigated or determined in the District Court.

3. Whether the District Court was correct in determining that the Prospectus issued in connection with the Exchange Offer made no material misrepresentations and contained all the material facts required by Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78n(e), and that therefore there was no violation of the Act.

4. Whether the District Court acted within its discretion in declining to exercise jurisdiction over questions of state law.

5. Whether the District Court was correct in determining that plaintiff could be adequately compensated by an award of money damages assuming that he were able ultimately to prove a claim.

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*Unless otherwise indicated, all references are to pages of the Joint Appendix.

Statement of the Case

On September 4, 1974, WRG, an advertising agency, announced to the public that it would offer to holders of 1,405,008 shares of its common stock a package consisting of $3 in cash and $8 principal amount in debentures in exchange for each share of stock tendered ("Exchange Offer"). On October 3, 1974, WRG filed its Exchange Offer Registration Statement with the Securities and Exchange Commission ("SEC"). On November 4, 1974, the SEC declared WRG's Registration Statement effective.

On November 19, 1974, appellant, then the holder of 100 shares of WRG stock, commenced the present action asserting violations of the federal securities laws and seeking an injunction against consummation of the Exchange Offer. An evidentiary hearing was held on November 25, 1974 at which five witnesses testified. On December 5, 1974, the District Court denied appellant's motion for a preliminary injunction, ruling that all material facts were disclosed in the WRG Prospectus and that even if appellant had a valid claim he would have an adequate remedy at law.

Following denial of appellant's motion for a preliminary injunction against consummation of the Exchange Offer, the transactions contemplated by the offer were completed. WRG has accepted tenders of 1,166,395 shares of its stock and has paid the tendering shareholders $3,499,185 in cash and has issued $9,331,160 principal amount in debentures. The debentures are trading on the American Stock Exchange.*

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* Appellant has discussed post-Exchange Offer developments at p. 43 of his brief, where he sets forth slightly inaccurate figures for the number of WRG shares tendered pursuant to the Exchange Offer and the amount of WRG debentures issued. To present a complete and accurate picture, appellees have set forth here the actual number of shares tendered and the amounts paid by WRG. Post-Exchange Offer developments, although not part of the record on appeal, can properly be considered by this Court on the question of mootness, discussed at pp. 11-13 *infra*. *Mills* v. *Green*, 159 U.S. 651, 653, (1895); *Kalimian* v. *Liberty Mutual Fire Ins. Co.*, 300 F.2d 547, 549 (2d Cir. 1962).

This appeal is from the District Court's denial of appellant's motion for a preliminary injunction. Appellant did not request, either from this Court or from the District Court, any stay of the consummation of the Exchange Offer pending appeal.

On this appeal, appellant no longer seeks the relief sought from Judge Carter below. Rather, appellant comes to this Court seeking new relief: a preliminary injunction barring appellees from making any further acquisitions of WRG stock through purchase, merger or retirement (Appellant's Brief, p. 67).

1. History of WRG

WRG was founded and incorporated in New York in 1966 by appellee Mary Wells Lawrence and two partners (89a). Stock in the Agency was initially offered to the public in October 1968 at a price of $17.50 per share (71a). From October 1968 to May 1970, WRG stock was traded in the over-the-counter ("O-T-C") market (253a). The stock was then listed and traded on the American Stock Exchange. A second public offering was made in April 1971 at $21.50 per share (71a). In August 1971 trading in WRG stock was transferred to the New York Stock Exchange (163a). The stock reached its high closing price of $27.875 per share on January 31, 1972. Thereafter, in spite of a good record of increases in revenues and earnings, the price of the stock declined substantially (71a).*

* Appellant asserts at p. 32 of his brief that the results for the first ten months of WRG's 1974 fiscal year "indicate that the full year's operation culminated in higher billings and earnings than for fiscal 1973". In fact, the results for fiscal year 1974 show a decline. Net income for 1974 totalled $3,211,145 or $1.97 per share, down from 1973 when net income was $3,375,077 or $2.08 per share (1974 Annual Report).

2. The Exchange Offer

The reasons for the Exchange Offer stem from the special business problems inherent in the advertising business. An advertising agency is a personal service business whose entire existence depends upon the talent, skills and personalities of key individuals who produce the creative advertising and marketing conceptions which their clients buy. Just as Mrs. Lawrence was able to leave the agency which employed her and create this agency in 1966, so could others employed by WRG do the same. It is essential to WRG to keep these people motivated and committed to it. Thus, when WRG decided to go public in 1968, it was not motivated primarily by the desire for additional capital which underlies most public offerings; as a service company, WRG's capital needs were modest. Rather, WRG went public in the expectation that a strong public market for the Agency's stock would develop and provide opportunities for incentive compensation through stock options, thereby attracting and keeping first-rate employees, and would provide opportunities for growth through acquisitions (71a, 343a). The anticipated advantages of public ownership were thought by WRG to outweigh the disadvantages of loss of confidentiality in connection with client and employee relationships and acquisition opportunities and the loss of flexibility inherent in private status (71a-72a, 342a-50a).

In an effort to make WRG a success as a publicly-held agency, management held costs to a minimum, and the Agency became a leader in the industry in earnings, return on investment and growth. Although WRG stock initially was well received, it failed, like the stock of advertising agencies in general, to sustain investor interest and support. The average advertising industry price-to-earnings

ratio has been far below the average of other publicly-held companies, apparently reflecting investor concern over the fragile relationships agencies have with their clients and employees (344a).

As a result, WRG was left with all of the disadvantages of public status and none of the advantages. Indeed, in the areas where public status was supposed to have been an asset, it had become a liability (349a). Despite WRG's efforts to adapt its stock option plan to the deteriorating price of its stock, the stock options which were intended as incentives became meaningless and were viewed by WRG personnel as the Agency's excuse for not paying higher salaries and for having no pension or profit-sharing plan (346a). Furthermore, the risk of even further price declines made unattractive to the Agency the award of increased cash compensation as an alternative to stock options in order to attract and retain creative personnel. Such awards would place a drain on earnings and would further drag down the price of the stock, which had declined even as WRG's earnings had increased (347a-48a).

In addition, the stock no longer served as an effective means of acquiring other agencies, and its low price had not enhanced the Agency's image (348a). WRG had also been confronted with client demands for greater services for a shrinking advertising dollar and with increasing governmental regulation and the "consumerism" movement (347a). In short, economic, market and industry conditions developed to the point where WRG found its future as a growth and investor-oriented, publicly-held company to be bleak and concluded that a fundamental change in orientation and outlook was in the long-term best interests of the Agency. Accordingly, after careful consideration, the Board of Directors determined that WRG should offer to reacquire the publicly-held stock in a manner that would

give stockholders the opportunity to sell their stock at a premium (349a).

It was believed that a substantial reduction in the publicly-held shares and a shift in orientation would give the Board of Directors greater freedom and flexibility to make decisions in the best long-term interests of the Agency. It would result in reduced concern over short-term impacts on earnings, would give employees a greater sense of proprietorship and interest in the success of the Agency, and would make practicable the adoption of a stock option or purchase plan based on book value (72a, 349a). A substantial reduction in the number of publicly-held shares could also be expected to reduce investor and public interest so as to afford WRG reduced visibility and a greater degree of confidentiality (72a, 350a).

To implement the decision to make the Exchange Offer, WRG filed with the SEC on October 3, 1974, a registration statement on Form S-1 including a prospectus describing the proposed transaction in detail. The SEC staff sent its comments to WRG on October 25, and, on October 30, WRG informally submitted to the SEC staff Amendment No. 1 to the Registration Statement. After being notified by the SEC staff that it had no further comments, WRG formally filed the Amendment on November 1. The SEC declared the Registration Statement effective on November 4, 1974.

By its Prospectus (59a-119a), WRG offered to accept up to 1,405,008 shares, representing all outstanding shares of its stock other than the 226,850 shares owned by members of its Board of Directors. In exchange for each share of stock, WRG offered a package consisting of $3 cash plus 10% interest-bearing debentures in the principal amount of $8.

Immediately prior to the announcement of the Exchange Offer, the market value of WRG stock had been $5.50 (59a, 71a, 76a). The $11 per share face value of the package was

thus exactly double the market value of the stock and was substantially above the book value of $10.43 per share (64a). The new debentures were expected to trade at an approximately 25% discount from face value; thus the market value of the package offered was approximately $9 per share (73a, 76a, 82a)—64% higher than the market value of WRG stock at the time the offer was announced.

The Exchange Offer was voluntary in nature. This was emphasized in the Prospectus, starting with its very first page: *"Participation in the Exchange Offer is completely voluntary and the Company makes no recommendation with respect thereto."* (59a, Italics in original. See also 61a, 65a, 72a). The Prospectus explained that White, Weld & Co. Incorporated ("White Weld"), the Dealer Manager of the Exchange Offer, had agreed to make an O-T-C market in the common stock if it should be delisted from the New York Stock Exchange after the tender offer (74a). The O-T-C market is the market which accommodated all trading of WRG stock for a year and a half after its first public offering in 1968.

3. Appellant's Theory of the Case

In support of his claims under the federal securities laws, appellant asserts theories which fall into three distinct categories. First, he claims that the Prospectus made material misrepresentations and omitted material facts. Second, he contends that there is an inherent evil in any corporation's reacquiring its publicly-held shares, and asks the Court to adopt what amounts to a rule that "going private" is a *per se* violation of the securities laws.* Third, he claims that

* Appellant relies for this novel proposition on an unofficial speech of one Securities and Exchange Commissioner (A.A. Sommer, Jr.) made to a law school group after the SEC itself had declared effective the WRG Registration Statement and Prospectus. Subsequently both Mr. Sommer and the Chairman of the SEC confirmed that Mr.

the offer was for an improper purpose and that the price offered was too low.

4. The Decision Below

In considering appellant's motion for a preliminary injunction, the District Court applied the standard that appellant either (a) must show the likelihood of success on the merits and irreparable injury, or (b) must raise sufficiently serious questions going to the merits of his case as to make them fair ground for litigation and establish that the balance of hardships tips decidedly in his direction (729a). The Court held that appellant met neither test.

After hearing testimony from five witnesses and reviewing the evidence presented in some 53 documents, the District Court concluded that:

> "The Prospectus gives him [the shareholder] all the relevant facts and he can act on the basis of full information." (733a).

The opinion stated that " * * * the omissions and misrepresentations relied upon cannot be considered material * * *," whether the test of materiality was whether a reasonable man would or might consider them important in making a decision to tender or not (729a, 730a).

Further, the Court ruled that going private is not *per se* violative of the securities laws, and that the present action

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Sommer was speaking only for himself and not for the SEC or its staff (361a). Even Mr. Sommer, however, did not take the extreme position apparently embraced by appellant—*i.e.*, that there are *no* circumstances under which an offer by a corporation to reacquire its publicly-held shares may be lawful and proper; rather he suggested that there may be circumstances when business considerations would warrant it. The SEC itself appears to be moving currently in the direction of adoption of rules which would recognize that going private transactions are not improper so long as they are for "valid business purposes" and "fair". (1934 Act Release No. 11231 (Feb. 6, 1975)).

does not raise serious questions under Sections 10(b) and 14(e) even when those sections are read "flexibly and not technically or restrictively * * *." (734a, 735a).

With respect to appellant's contention that the price offered by WRG for the stock was too low, the Court pointed out that current market value is regarded by the authorities as a fair indication of value (732a), and concluded in any event that the question of whether or not the price is low does not raise a federal question (733a).

Finally, the District Court concluded that even if appellant had a claim cognizable under the federal securities laws, he had an adequate remedy at law since money damages would suffice to make him whole (735a).

Argument

This appeal should be dismissed since there is no issue which is properly before this Court. The relief sought below is now moot, and appellant may not request new relief on appeal.

If the merits of the appeal be considered, the order denying the preliminary injunction should be affirmed, since the District Court properly exercised its discretion in denying appellant's motion. Appellant failed to establish any reasonable probability of success in his claim of violation of the securities laws and failed even to raise questions which are fair ground for litigation. The Prospectus contains no material omissions or misrepresentations, and the stockholders were given complete information on which to base their decisions whether or not to tender.

Appellant's stake in the outcome of this action is purely monetary. He was the owner of 100 shares of stock; if he has a valid claim he can be adequately compensated by an award of money damages.

I.

THERE IS NO ISSUE PROPERLY BEFORE THIS COURT

A. The Preliminary Injunctive Relief Sought Below Has Become Moot.

An appeal from the denial of a preliminary injunction must be dismissed as moot if the events sought to be restrained have already taken place. *See, e.g., Richland* v. *Crandall,* 353 F.2d 183 (2d Cir. 1965) (per curiam); *Sawyer* v. *Pioneer Mill Co.,* 300 F.2d 200, 202 (9th Cir.), *cert. denied,* 371 U.S. 814 (1962); *Brill* v. *General Industrial Enterprises, Inc.,* 234 F.2d 465, 469 (3d Cir. 1956). *See generally DeFunis* v. *Odegaard,* 416 U.S. 312 (1974); *Mills* v. *Green,* 159 U.S. 651 (1895).

In *Richland, supra,* the plaintiff sought a preliminary injunction against a stockholders meeting, claiming that the proxy material contained misrepresentations in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(a). The district court denied a preliminary injunction, and the stockholders meeting was held. On appeal, this Court dismissed the appeal as moot:

> "The relief which was sought * * * would be impossible of fulfillment for the events which Richland sought to restrain have already occurred." 353 F.2d at 184.

In the present case, appellant had obtained from the District Court a temporary restraining order against consummation of WRG's Exchange Offer, which WRG was contractually obligated to accomplish "as soon as practicable." (61a).* Yet when the restraining order was lifted,

* This obligation was emphasized at the hearing on appellant's motion for an injunction, and was the reason for Judge Carter's issuing a restraining order, rather than simply pursuing his preference that WRG voluntarily forebear from consummating the transaction (525a-28a).

appellant did not seek a stay from the District Court or from this Court, and WRG thereafter completed the Exchange Offer by distributing cash and debentures to shareholders who had tendered.

This case now presents a situation in which the transaction sought to be prevented cannot be undone by any order of this Court.* The recipients of the Exchange Offer (many of whom expressly disassociated themselves from appellant's desire to prevent the Exchange Offer) (364a-87a) are not before the Court. Moreover, many of those who participated in the Exchange Offer have doubtless already sold their debentures; even before the offer was consummated there was trading in the WRG debentures on a when-issued basis, and now they are traded on the American Stock Exchange. Obviously, present holders of WRG debentures who were not parties to the Exchange Offer are also not before the Court.

In these circumstances, an injunction cannot issue. *See, e.g., Sawyer* v. *Pioneer Mill Co.,* 300 F.2d 200 (9th Cir.), *cert. denied,* 371 U.S. 814 (1962); *Fink* v. *Continental*

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* Of course, if the appellate court is in a position by mandatory injunction to reverse the transactions which have taken place and thereby bring about the relief sought, the case is not moot. *See, e.g., Porter* v. *Lee,* 328 U.S. 246, 251 (1946). For example, in a case where all of the parties to a transaction sought to be enjoined are defendants, the fact that they complete the transaction after denial of a preliminary injunction will not moot the appeal; the appellate court has jurisdiction over them and can force them to reverse the process. *See Ramsburg* v. *American Investment Co.,* 231 F.2d 333, 336-38 (7th Cir. 1956). Where, however, the appellate court cannot cause the transaction to be reversed—whether for lack of personal jurisdiction over all parties to the transactions or for some other reason—the ordinary rule of mootness applies (see cases cited in text, pp. 12-13). The failure to realize that the doctrine of *Porter* v. *Lee, supra,* is subject to this limitation caused the panel in *Symington Wayne Corp.* v. *Dresser Industries, Inc.,* 383 F.2d 840, 842 (2d Cir. 1967), to conclude in dictum on an issue not raised by the parties that the case stood for a broader proposition.

Foundry & Machine Co., 240 F.2d 369 (7th Cir.), *cert. denied,* 354 U.S. 938 (1957); *Sobel* v. *Whittier Corp.*, 195 F.2d 361 (6th Cir. 1952); *Kelaghan* v. *Industrial Trust Co.*, 211 F.2d 134 (1st Cir. 1954) (per curiam). The *Sobel* case is illustrative. Sobel, a stockholder of the defendant Whittier Corporation, sought to block a merger of Whittier and another company which was not a party to the suit. Following denial of Sobel's motion for a preliminary injunction, the merger was consummated. On appeal, the Sixth Circuit held the appeal moot:

> "In our determination of the case, it is unnecessary to pass upon many interesting issues presented by the briefs and arguments, or upon the matters decided by the district court, because of one primary and controlling fact. Appellant did not apply for a stay of proceedings or injunction pending appeal to this court. Her bill of complaint sought only that the merger be restrained. *This relief would now be impossible. In order to grant relief, we would be obliged to set aside all contract rights between parties who have never been before the court.*" 195 F.2d at 363 (emphasis added).

This is precisely the situation in the case at bar; there does not appear to be any practical way, in the words of Judge Mansfield, "for a court to 'unscramble the eggs.'" *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973). Accordingly, this appeal must be dismissed as moot.

B. Appellant May Not Raise New Issues or Seek New Relief on Appeal.

Apparently recognizing that the relief sought below can no longer be granted, appellant now asks for entirely new relief: an injunction prohibiting all appellees from acquir-

ing any further WRG stock, by purchase, merger or retirement (Appellant's Brief, p. 67).

It is well settled that a party may not raise new issues or seek new relief on appeal. *See, e.g., Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941); *Terkildsen* v. *Waters,* 481 F.2d 201, 204-205 (2d Cir. 1973); *Walter E. Heller & Co.* v. *American Flyers Airline Corp.,* 459 F.2d 896, 902 (2d Cir. 1972); *Ansul Co.* v. *Uniroyal, Inc.,* 448 F.2d 872, 886 (2d Cir. 1971), *cert. denied,* 404 U.S. 1018 (1972); *Schwartz* v. *S.S. Nassau,* 345 F.2d 465, 466 (2d Cir.), *cert. denied,* 382 U.S. 919 (1965); *List* v. *Fashion Park, Inc.,* 340 F.2d 457, 461 (2d Cir.), *cert. denied,* 382 U.S. 811 (1965); *Trans World Airlines, Inc.* v. *Hughes,* 332 F.2d 602, 613-14 (2d Cir. 1964), *cert dismissed as improvidently granted,* 380 U.S. 248 (1965). The rationale of this rule was set forth by Justice Black in *Hormel* v. *Helvering, supra*:

> "Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; *it is* equally *essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.*" 312 U.S. at 556 (emphasis added).

It is not enough that the parties may have presented evidence on a general subject; the parties and the district court must have the opportunity to present and evaluate

evidence in light of specific issues. Thus, in *Terkildsen, supra,* this Court declined to consider new issues on appeal:

> "* * * where * * * factual questions may have been implicated as to which the judge made no findings because the issue was not directly raised and equally, where considerations underlying a subtle legal issue could have been exposed and distilled by the able district judge so as to facilitate more informed consideration by this court." 481 F.2d at 204-05 (footnote omitted).

Here, there are at least two classes of evidence relevant to the new relief now sought: (1) evidence as to what actions WRG would take if fewer than all of the public shares were tendered in response to the Exchange Offer, and (2) evidence as to the propriety of the newly-proposed relief. On the first of these issues, appellant did attempt to offer some evidence, but the District Judge expressed the view that the issue was outside of the scope of the hearing, and the record was left with fragmentary and at best ambiguous evidence on the point. On the question of the propriety of the new relief, no testimony at all was adduced at the hearing.

Appellant's entire theory of why he is entitled to the new relief is based on a single ambiguous statement by one witness. His interpretation of this answer was disputed by the witness who gave it and is contradicted by evidence in the record. Of course, the District Judge made no finding on the point, having stated that he regarded the matter as not pertinent to the issues before him.

The sequence of events was as follows:

In response to a question from appellant's counsel regarding what WRG would do if the Exchange Offer were not fully subscribed to, Mrs. Lawrence, who had been called as appellant's second witness, answered that WRG would decide then how to acquire private status which is what it

wanted and concluded her answer with the sentence "We haven't made that decision yet." (469a). Judge Carter then suggested that counsel was "wasting time" with questions regarding what would happen if the Exchange Offer were not successful and that in seeking to block the offer, counsel had to be acting on the assumption that the offer would be successful. Appellant's counsel argued that Mrs. Lawrence had admitted that WRG intended to go "fully private" and would acquire all remaining shares after the Exchange Offer. Mrs. Lawrence and WRG's counsel immediately disputed this characterization of the testimony (470a).

In fact, WRG's Prospectus clearly stated that WRG had "no * * * present plans" to purchase WRG stock after the Exchange Offer and that WRG directors had "made no determination" whether to effect a merger to retire the remaining publicly-held shares in the event that the directors ended up owning more than two-thirds of the shares after the Exchange Offer (75a).

In sum, although there is fragmentary and ambiguous evidence in the record as to post-Exchange Offer plans, it is of an unsatisfactory character because post-Exchange Offer planning was not an issue presented for determination below, where the whole thrust of the injunctive demand was to block the Exchange Offer and thus avoid any "post-offer" issue.

As to the propriety of the new relief, there is no evidence whatsoever in the record. Even on its face, however, the proposed relief appears inappropriate. For example, appellant complains vigorously that one of the effects of appellees' actions will be to reduce the liquidity of the market for WRG shares (13a). Yet one of his new demands is that the individual defendants who hold nearly half of

the WRG outstanding stock be barred from participating in the market—a sure way of reducing market liquidity. This example underscores the validity of the policies behind the rule prohibiting consideration of new issues on appeal. Those policies are particularly strong here, where the record consists entirely of evidence adduced at a preliminary injunction hearing held only four business days after commencement of the action.

If appellant wants a preliminary injunction granting the relief he now proposes on appeal, he must address that request to the District Court. If he does so, appellees are confident that the evidence would require that appellant's motion be denied.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A PRELIMINARY INJUNCTION.

This Court has often observed that its function on appeal from denial of a motion for a preliminary injunction is limited, and that it will not reverse the district court except upon a clear showing that the court below abused its discretion. *See, e.g., Checker Motors Corp.* v. *Chrysler Corp.,* 405 F.2d 319 (2d Cir.), *cert. denied,* 394 U.S. 999 (1969); *Carroll* v. *Associated Musicians,* 284 F.2d 91, 92 (2d Cir. 1960) ("very limited scope of review"). In *Checker,* this Court formulated the test as follows:

> "A clear abuse of discretion, * * * not present in this case, must be shown to an appellate court in order to obtain a reversal of the trial court's denial of temporary injunctive relief." 405 F.2d at 323 (citations omitted).

In exercising his discretion, Judge Carter was obliged to apply this Court's standard for determining whether a preliminary injunction should issue:

"* * * a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973) (citations omitted; emphasis in original).

Here, appellant has failed to satisfy either branch of the test.

A. Appellant Has Not Shown A Colorable Case on the Merits.

1 *The Federal Securities Law Claims*

Appellant has alleged that appellees have violated Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78j(b) and 78n(e), and SEC Rule 10b-5. Since, except in one respect which is not material here,* Section 14(e) appears to do no more than apply the prohibitions of Rule 10b-5 specifically to tender offers, *e.g., Electronics Specialty Co.* v. *International Controls Corp.,* 409 F.2d 937, 940-41 (2d Cir. 1969), there is no need to treat that section separately, and the case can be analyzed in light of familiar principles under Rule 10b-5. Appellant advances two different kinds of 10b-5 claims: (a) that WRG made material misrepresentations and nondisclosures, and (b) that the Exchange Offer itself violates Rule 10b-5. These claims will be discussed separately.

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* Section 14(e) gives a company which is the target of a tender offer standing to sue which it does not have under Rule 10b-5. *See Chris-Craft Industries, Inc.* v. *Bangor Punta Corp.,* 480 F.2d 341, 361 (2d Cir.), *cert. denied,* 414 U.S. 910 (1973).

a. There Are No Material Nondisclosures or Misrepresentations.

Appellant sets forth at pages 64-65 of his brief a long list of claimed misrepresentations and nondisclosures. These claims—most of which are not even pleaded in the complaint—are without merit. What Rule 10b-5 required in this case was that WRG shareholders be informed of the *material facts, i.e.,* those which they would or might consider important to their decision whether or not to tender their shares pursuant to the Exchange Offer. *See, e.g., Popkin* v. *Bishop,* 464 F.2d 714, 719-20 (2d Cir. 1972); *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540, 545 (2d Cir. 1967); *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627, 635 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967); *O'Neill* v. *Maytag,* 339 F.2d 764, 767 (2d Cir. 1964).

The following analysis will demonstrate that each of appellant's charges of deception is without merit. As Judge Carter found:

> "The Prospectus gives him all the relevant facts and he can act on the basis of full information." (733a).

*1. *The claim that appellees misrepresented that the Exchange Offer was "voluntary" while at the same time making representations "in the subtle language of duress" as to consequences for those who chose not to tender their WRG stock.* Here, appellant argues that the Exchange Offer was coercive because WRG included in the Prospectus information as to possible undesirable consequences to shareholders who elected not to participate in the Exchange Offer.

This claim has no merit. WRG was obligated under controlling decisions of this Court to inform shareholders of

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*Not alleged in the complaint.

possible consequences—whether favorable or unfavorable —of declining to participate in the Exchange Offer. *See Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 251 (2d Cir. 1973); *Gerstle* v. *Gamble-Skogmo, Inc.,* 478 F.2d 1281, 1298 (2d Cir. 1973); *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.,* 476 F.2d 687, 697 (2d Cir. 1973).

The Prospectus, therefore, informed stockholders of the possible adverse consequences of remaining a WRG stockholder (74a, 75a), and informed them as well of the possible beneficial consequences of that course of action, such as higher book value and higher earnings per share (73a-74a). The Prospectus also informed them that White Weld had agreed to make an O-T-C market in the stock if it were to be delisted, so that non-tendering shareholders would continue to be able to trade their shares (74a).

2. *The claim that appellees failed to disclose that their purpose was to gain control of WRG and increase their interests in the assets and earnings of WRG.* This claim is without basis in fact. The purposes of the Exchange Offer are set forth in the Prospectus and are discussed at pages 5-7 *supra.* In light of appellant's allegation in his complaint that appellee Lawrence had control of WRG prior to the Exchange Offer (7a), it is difficult to perceive how she and her fellow directors could have entertained a purpose to *acquire* control. Furthermore, as the Prospectus clearly states, any shareholder who elected not to tender pursuant to the Exchange Offer would participate to the same extent as directors in any per share increase in book value and earnings (74a).

*3. *The claim that appellees failed to disclose whether or not they considered the Exchange Offer to be fair.* The

*Not alleged in the complaint.

federal securities laws are designed to furnish shareholders with the facts on which investment decisions should be made, not with investment advice. As this Court said in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), *cert. denied*, 394 U.S. 976 (1969):

> "The only regulatory objective is that access to material information be enjoyed equally, but this objective requires nothing more than the disclosure of basic facts so that outsiders may draw upon their own evaluative expertise in reaching their own investment decisions with knowledge equal to that of the insiders." 401 F.2d at 849.

That is particularly true in the present case where the decision whether to participate in the Exchange Offer could very much depend on the individual circumstances of each shareholder, such as the price at which he purchased, his investment objective (*e.g.*, short-term profits, long-term appreciation) or his tax situation. Under the circumstances, it was appropriate for WRG to leave to its public shareholders the investment decision presented by the Exchange Offer.

4. *The claim that WRG failed to furnish an independent expert opinion on the matter of the fairness of the value offered under the Exchange Offer.* For essentially the same reasons that WRG was not required to state its own opinion on the fairness of the offer, WRG was not required to furnish an expert opinion on its fairness. While it has been held that if an opinion is referred to in a proxy statement or prospectus the supporting details must also be provided, *see, e.g., University Capital Corp.* v. *Barbara Lynn Stores, Inc.*, 74 Civ. 4460 at page 41 (S.D.N.Y. 1974) (Weinfeld, J.) (Addendum B to Appellant's Brief), no case has held that there is any obligation to refer to an opinion in the first place.

WRG had obtained an expert opinion as to the fairness of the Exchange Offer. White Weld furnished a letter to WRG, stating its opinion that the package to be offered represented "fair value" for WRG stock (357a). Since appellant claims that the Prospectus was already coercive, his claim that the White Weld opinion should have been included in the Prospectus cannot be a serious one. As appellant's own authorities recognize, the inclusion of such an opinion could only further encourage stockholders to tender. *See, e.g., Denison Mines Ltd.* v. *Fibreboard Corp.*, CCH Fed. Sec. L. Rep. ¶94,869, at 96,962 (D. Del. 1974), in which the court considered a proxy statement representation that a proposed transaction had been judged to be fair by an investment banking firm, and stated:

> "The reason this representation was made is obvious. Because of the independence of Lehman Brothers, as well as its reputation in the investment banking field, its opinion added persuasive support for management's view. In the context of this Proxy Statement, the Court believes the impact of the reference to Lehman Brothers' opinion on a substantial number of stockholders would be difficult to overestimate."

See also Tanzer Economic Associates, Inc. v. *Haynie,* CCH Fed. Sec. L. Rep. ¶94,873, at 96,979 (S.D.N.Y. 1974) (Frankel, J.).

Shareholders were given all relevant facts; the decision as to what course to follow in response to those facts was very much an individual one to be made in the light of each shareholder's particular circumstances, uninfluenced by recommendations for either course.

*5. *The claim that appellees misrepresented that the WRG Board of Directors considered the Exchange Offer to be in the best interests of the company.* This claim is said

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* Not alleged in complaint.

to be based on the proposition that no formal Board resolution was adopted stating this in so many words. But the fact is that the Board voted unanimously to undertake the Exchange Offer (560a, 572a), and implicit therein is the Board's judgment that the Exchange Offer was in WRG's best interests. Moreover, each member of the WRG Board of Directors confirmed this by signing the Registration Statement, which includes the statement in the Prospectus that the Board had concluded that purchase of WRG's public shares "would be in the best interests of the Company" (72a).

*6. *The claim that appellees failed to disclose their intention to take whatever steps were required to achieve private status.* The evidentiary inaccuracies in this claim are discussed fully at pages 15-16 *supra.*

*7. *The claim that appellees failed to disclose the circumstances and nature of the agreement among the directors not to tender their shares.* This claim is factually inaccurate, as there was nothing more to disclose than the mere fact that the directors had made such an agreement. The agreement by directors not to participate in the Exchange Offer had the obvious effect of ensuring that the offer would not be a device permitting directors to "bail out" at a price substantially higher than that available in the public market, while ensuring that all other shareholders would have the opportunity to participate in the Exchange Offer. The fact of the agreement was repeatedly disclosed in the Prospectus (59a, 61a, 66a, 72a, 103a), and that was all there was to disclose.

8. *The claim that the Prospectus failed to disclose purchases of WRG stock by appellee Lawrence and three other WRG officers in 1974.* Since Mrs. Lawrence's aggregate

* Not alleged in complaint.

ownership is set forth in the Prospectus (96a), appellant is limited to the claim that her purchase of 30,500 of her 115,000 shares in early 1974 is somehow material. These shares, which constituted less than 2.7% of the outstanding shares, were purchased on the open market many months prior to the planning of the Exchange Offer; they were purchased at prices then prevailing, which were approximately at or below the market value per share offered in the Exchange Offer (289a-97a). They were purchased because Mrs. Lawrence did not want to hold fewer shares than one of her co-founders who was then in the process of leaving the active employ of the Agency (346a). These purchases were duly recorded in SEC filings (289a-97a); they are in no way material to the subject of the Exchange Offer and therefore were not set forth in the Prospectus.

Appellant also complains of minor purchases by two WRG officers* prior to the planning of the Exchange Offer and a minor purchase by one officer** the day after the Exchange Offer was announced and after the market had risen in response to the announcement. These purchases are plainly immaterial to the Exchange Offer under any rational test.

9. *The claim that appellees failed to disclose information as to original purchases and subsequent sales of WRG stock by appellees and the gains they realized thereon.*

*In July 1974, Frank G. Colnar, Executive Vice President—Financial Planning of WRG and a director, made open market purchases of 100 shares of WRG stock at $6.00 per share and 200 shares of WRG stock at $6.25 per share (299a-300a). In July 1974, E. Donald Challis, a Vice President of WRG, purchased 100 shares of WRG stock on the open market at $6.00 per share (302a-03a).

**On September 5, 1974, Catherine Gibson, a Vice President of WRG, purchased 1,000 shares on the open market at $7.75 per share (305a-06a).

Appellant complains that information as to the prices paid for founders' stock by Mrs. Lawrence and prices paid by other early shareholders, as well as information as to gains realized by Mrs. Lawrence and these other shareholders in public offerings, should have been included in the Prospectus. Amounts paid for stock when the Agency was in its infancy simply have no relevance to this Exchange Offer, made six to eight years later. Although the amounts received by selling shareholders in the public offerings and the prices at which the offerings were made do not appear to be material, they are in fact set forth in the Prospectus (71a).

10. *The claim that the Prospectus fails to disclose that the total number of shares ever offered publicly by WRG was 50,000.* This is another fact contained in prior SEC filings which appears to be of absolutely no relevance to the Exchange Offer. The Prospectus does state that most of the shares in the first public offering and all of the shares in the second public offering were sold by stockholders rather than by WRG (71a), so that if information as to the source of the shares in the hands of the public were required, it was provided.

*11. *The claim that the Prospectus fails to disclose that the Trust Indenture gives WRG the right to double the amount paid into the Sinking Fund in any given year.* Here again, appellant has his facts wrong. The Trust Indenture under which the debentures were issued does not grant WRG any such right, for a broader right already existed. Such a provision had been proposed in the White Weld letter cited by appellant (357a), but was not included in the Trust Indenture since it would have been meaningless in view of the fact, clearly stated in the Prospectus, that

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*Not alleged in the complaint.

WRG is free at any time to redeem any and all of the debentures without payment of a premium (59a, 63a, 79a).

These are the claims of misrepresentation and omission which appellant contends entitle him to a preliminary injunction. The above analysis demonstrates that in many instances appellant is in error as to the facts, that in others he is in error as to what the law requires, and that there were no material omissions or misrepresentations in the WRG Prospectus.

b. The Exchange Offer Itself Does Not Violate the Federal Securities Laws.

Appellant's other contention under the federal securities laws appears to be that the Exchange Offer violates Rule 10b-5 without regard to whether there were any material misrepresentations or nondisclosures. He would thus have this Court rule that a corporation's repurchase of its shares constitutes a *per se* violation of the federal securities laws. Appellant has mistaken the reach of those laws.

The Supreme Court has noted that Section 10(b) does not deal with all claims of corporate mismanagement; what that section proscribes is transactions which are deceptive. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.,* 404 U.S. 6, 12 (1971). Without the element of deception, there is no claim under Section 10(b).

This Court has affirmed the necessity for proof of deception under Rule 10b-5 in a long line of cases. *See, e.g., Popkin* v. *Bishop,* 464 F.2d 714, 718-20 (2d Cir. 1972); *Mutual Shares Corp.* v. *Genesco, Inc.,* 384 F.2d 540, 544-45 (2d Cir. 1967); *Vine* v. *Beneficial Finance Co.,* 374 F.2d 627, 635 (2d Cir.), *cert. denied,* 389 U.S. 970 (1967); *O'Neill* v. *Maytag,* 339 F.2d 764, 767-68 (2d Cir. 1974).

As this Court observed in *Popkin* v. *Bishop, supra,*

> "Section 10(b) of the Exchange Act and Rule 10b-5 are designed principally to impose a duty to disclose and inform rather than to become enmeshed in passing judgments on information elicited." 464 F.2d at 719-20.

In *O'Neill* v. *Maytag,* the Court explained that a breach of fiduciary duty violated Rule 10b-5 only where deception was present:

> "The question posed by this case is whether it is sufficient for an action under Rule 10b-5 to allege a breach of one of these general fiduciary duties where the breach does not involve deception. We think that it is not: At least where the duty allegedly breached is only the general duty existing among corporate officers, directors and shareholders, *no cause of action is stated under Rule 10b-5 unless there is an allegation of facts amounting to deception.*" 339 F.2d at 767-68 (emphasis added).

The requirement that there be proof of deception is illustrated clearly by comparing the decisions of this Court in *Popkin* v. *Bishop, supra,* and *Schlick* v. *Penn-Dixie Cement Corp.,* CCH Fed. Sec. L. Rep. ¶94,853 (2d Cir. 1974). Plaintiffs in each case were minority stockholders in corporate subsidiaries who challenged transactions under which the subsidiaries were merged into the parent corporations. Both plaintiffs claimed that the exchange ratios in the mergers were unfair in giving the parent corporations more than their fair shares of the assets of the subsidiaries. In *Popkin,* the Court said it was "willing to assume that [plaintiff] is correct and that the exchange ratios are unfair," (464 F.2d at 717), but nevertheless affirmed the dismissal of the complaint under Rule 10b-5, stating that there was no "hint of any misrepresentation by defendants

or of a failure on their part to disclose any material fact * * *" (464 F.2d at 718).

In *Schlick,* however, which differed from *Popkin* only in the element of deception, the opposite result was reached. The *Schlick* complaint alleged that the defendants had manipulated the market in the subsidiary's stock to justify the exchange ratios and had failed to disclose facts showing that the market price had been manipulated in the proxy materials sent to the shareholders regarding the proposed merger. *Schlick* was a classic case of deception, and this Court properly ruled that a cause of action had been stated under Rule 10b-5.

Appellant cites five district court cases for the proposition that a corporation violates Rule 10b-5 merely by offering to repurchase the shares held by its outside shareholders (Appellant's Brief, p. 50). The three cases decided in this Circuit fail to support appellant's contention because each involves the element of deception. *See Levine* v. *Biddle Sawyer Corp.,* 383 F.Supp. 618, 622 (S.D.N.Y. 1974) (Bonsal, J.) (complaint "replete with allegations of misrepresentation and nondisclosure * * *"); *University Capital Corp.* v. *Barbara Lynn Stores, Inc.,* 74 Civ. 4460 at page 38 (S.D.N.Y. 1974) (Weinfeld, J.) (Addendum B to Appellant's Brief) ("Given full and adequate disclosure the question of what is a fair price for the stock is not a question for the Court to decide."); *Broder* v. *Dane,* CCH Fed. Sec. L. Rep. ¶94,875 at 96,994 (S.D.N.Y. 1974) (Canella, J.) (court sought "solely to 'impose a duty to disclose certain information'"). The two cases from other circuits appear to be inconsistent with the rule in this Circuit, and in any event are distinguishable from the instant action. Both *Albright* v. *Bergendahl* (D. Utah 1974) (Ritter, J.) (Addendum A to Appellant's Brief) and *Bryan* v. *Brock & Blevins Co.,* 343 F.Supp. 1062 (N.D. Ga. 1972), *aff'd on state law issues only,* 490 F.2d 56 (5th Cir.),

cert. denied, 43 U.S.L.W. 3209 (Dec. 15, 1974), involved majority shareholders unilaterally imposing corporate mergers on unwilling minority shareholders to force them to sell their shares for no valid corporate purpose. Here, no shareholders have been forced to sell, and WRG has offered to purchase for valid business purposes. See discussion pp. 5-7 *supra.* While corporate repurcha. s, like other transactions, must pass muster under the disclosure provisions of Rule 10b-5, they do not constitute *per se* violations of Rule 10b-5.

2. *The State Law Claim*

Appellant's claim that the Exchange Offer was for an improper business purpose and that the offering price was too low asserts at best a state law claim rather than a federal claim. *See, e.g., Popkin* v. *Bishop,* 464 F.2d 714, 720 (2d Cir. 1972). The order denying appellant's motion for an injunction should be affirmed because the District Court properly refused to exercise pendent jurisdiction of the state-based claim, and because even under state law appellant does not have a valid claim.

a. The District Court Appropriately Declined To Rule on the State Law Claim.

Since diversity jurisdiction is not present here, the District Court could entertain state law claims only under the doctrine of pendent jurisdiction. Unlike diversity jurisdiction, pendent jurisdiction does not exist as of right; the determination whether to exercise pendent jurisdiction lies in the discretion of the district court, and should not be exercised unnecessarily. *See, e.g., United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966), in which the Supreme Court stated:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of

judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them * * * * *Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.* Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well. Similarly, *if it appears that the state issues substantially predominate,* whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, *the state claims may be dismissed without prejudice and left for resolution to state tribunals.*

* * * * *

"[a federal court need not] * * * tolerate a litigant's effort to impose upon it what is in effect only a state case. Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed." 383 U.S. at 726-27 (footnotes omitted, emphasis added).

Similarly, this Court has often recognized that if the federal claims are insubstantial, the state claims ought to be dismissed. *See, e.g., Schlick* v. *Penn-Dixie Cement Corp.*, CCH Fed. Sec. L. Rep. ¶94,853 at 96,873 (2d Cir. 1974); *McFaddin Express, Inc.* v. *Adley Corp.*, 346 F.2d 424, 427 (2d Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966).

This Court has also held that absent an abuse of discretion, the refusal of a district court to exercise pendent jurisdiction should not be disturbed on appeal. *See, e.g., Rogers* v. *Valentine*, 426 F.2d 1361, 136[illegible] (2d Cir. 1970) (per curiam).

In the present case, the District Court's decision not to consider state law claims is amply justified by the weakness

of appellant's federal claims. Judge Carter found that there were no material omissions or misrepresentations in the Prospectus (729a-30a, 733a) and that many of appellant's claims were "obviously makeweight arguments on the issue of §§10(b) and 14(e) materiality." (730a). The Court concluded that the record below held no basis for dealing with appellant's "going private" claim under the federal securities laws (735a). And since there is no intimate relationship between the disclosure questions raised by a 10b-5 claim and the valuation and business purpose issues raised by appellant's state claim, there are no considerations of judicial economy or convenience for litigants which would require that the Court deal with the latter questions. The District Court's refusal to consider appellant's state claim should thus be affirmed.

b. Appellant's State Law Claim Is Without Merit.

Even if the Court were to exercise pendent jurisdiction over appellant's claim as to the price and business purpose of the Exchange Offer, that claim should be dismissed as without merit under applicable state law for several reasons: first, because the Exchange Offer was entirely voluntary, and there was no forced sale; second, because WRG had valid business purposes for the Exchange Offer; and, finally, because the price offered was fair.

Under New York law, WRG was expressly authorized to repurchase its shares. Section 513(a) of the Business Corporation Law provides in relevant part that:

> "A corporation, subject to any restrictions contained in its certificate of incorporation, may purchase its own shares . . . out of surplus except when currently the corporation is insolvent or would thereby be made insolvent."

There is nothing in New York law which prohibits a corporation from making a tender offer to its shareholders.

Appellant's first error in his state claim lies in his reliance upon cases which, unlike the present case, involved stockholders who were *forced* to give up their stock at a price determined by the majority. For example, *Bryan* v. *Brock & Blevins Co.*, 490 F.2d 56 (5th Cir.), *cert. denied,* 43 U.S.L.W. 3209 (Dec. 15, 1974), involved a statutory merger under Georgia law in which the minority shareholder in a closely-held corporation had to accept cash for his shares. In *Lebold* v. *Inland Steel Co.*, 125 F.2d 369 (7th Cir.), *cert. denied,* 316 U.S. 675 (1941), the controlling shareholder of another closely-held corporation dissolved the corporation under West Virginia law, distributed cash, and purchased the assets of the corporation for itself.

In these cases, however, the minority stockholders did not have the option of continuing to hold their stock and of participating equally with the majority in any benefits, such as increased book value or earnings per share, expected to flow from the transaction. The majority in those cases both appropriated to itself any such benefits and forced the minority stockholders to accept a unilaterally predetermined price. Those transactions are sometimes referred to as "freeze outs". *See* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right,* 77 Harv. L. Rev. 1189, 1192-93 (1964).

In the present case, stockholders have not been forced to give up their stock; in terms of the number of shareholders tendering, as distinguished from the number of shares tendered, a majority elected not to participate in the Exchange Offer.* Their action is convincing proof the Exchange Offer was voluntary and that stockholders were free to sell or to continue to hold their shares depending

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* After the Exchange Offer, approximately 1,200 shareholders remained (WRG Annual Report for year ended October 31, 1974 on Form 10-K filed with the SEC), out of 2,117 who held shares on September 1, 1974 (75a).

simply on whether or not they regarded the offer as a good one. Thus appellant's cases are inapplicable because here there was no forced sale.

Appellant's cases are inapposite for another reason as well. In each case the purpose of the forced sale was solely to eliminate the minority stockholders. Here WRG had valid business reasons for offering shareholders a premium for their shares; WRG made the Exchange Offer primarily to help keep its creative personnel, improve its relationships with clients and provide a greater degree of confidentiality for its clients and its client relationships. (See discussion pp. 5-7 *supra.*)

Finally, on the question of the fairness of the Exchange Offer, the market value of the stock prior to the Exchange Offer announcement is controlling. The cases are clear that where a stock is actively traded on a national securities exchange and there is no evidence of manipulation, market price is controlling on the issue of value. *See Matter of Deutschmann,* 281 App. Div. 14, 116 N.Y.S. 2d 578 (1st Dep't 1952); *Matter of Marcus,* 273 App. Div. 725, 79 N.Y.S. 2d 76 (1st Dep't 1948); Israels, *Corporate Practice* § 14.06 (3d ed. 1974). In the *Marcus* case, *supra,* the test was formulated as follows:

> "[M]arket value is the controlling consideration where there is a free and open market and the volume of transactions and conditions make the market a fair reflection of the judgment of the buying and selling public." 273 App. Div. at 727, 79 N.Y.S. 2d at 78.

WRG stock was traded on the New York Stock Exchange in an atmosphere free of manipulation or nondisclosure. For a considerable period of time prior to the announcement of the Exchange Offer, the stock traded at a price far below the value of the package offered. The consensus of

the investors voting their dollars in the public market—the institutions, the brokerage houses, the speculators, and the individual investors—was that the stock of WRG, despite the Agency's steady growth of business and income, was worth only $5.50 per share. And there was nothing in WRG's recent performance to suggest that investors would find the stock any more desirable in the foreseeable future. The significance of market value was ably expressed by David W. Peck, then Presiding Justice of the Appellate Division, First Department, in his opinion in *Matter of Marcus,* 273 App. Div. 725, 730, 79 N.Y.S.2d 76, 81 (1st Dep't 1948):

> "There is no reason to think from anything which appears in this case that a more academic appraisal of the stock in this proceeding would be a closer approach to true value than the practical judgment of those most interested in the company and its stock, the daily traders who are backing their judgment with their money."

Appellant called one Belfer as an expert to testify on the question of the value of the WRG stock. Belfer engaged in what Bromberg has characterized as the "metaphysics of value," 1A Bromberg, *Securities Regulation—Fraud—Rule 10b-5* §6.3 (900), at 122.16 (1973), and emerged with a figure which he called the "intrinsic value" of the stock. White Weld demonstrated how far removed from reality Belfer's intrinsic value theory is. Using the Belfer formula, White Weld made a study of some 900 major companies and found that 98% of them were selling below their so-called "intrinsic value" (355a-56a).

This kind of comparison of WRG stock prices with those of other companies confirms the validity of measuring value by market price even in a depressed market. A WRG stockholder who participated in the Exchange Offer could realize promptly between $8 and $9 per share for his stock. He could then reinvest those proceeds in the depressed stock

of another company, and could buy many more shares with the proceeds of the Exchange Offer then he could have bought with the proceeds of an open market sale.

The Exchange Offer gave shareholders an opportunity to sell their shares for a price substantially in excess of the value the investing community had ascribed to them and fully complied with all requirements of New York law.

B. Appellant Has Not Shown Irreparable Harm or a Tipping of the Balance of Hardships in His Favor.

Depending on the strength of his showing on the merits, the applicant for a preliminary injunction must show either irreparable injury or a clear tipping of the balance of hardships in his favor. *See Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319, 322 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). Neither in the District Court nor in this Court has appellant demonstrated any irreparable injury or significant hardships which he would endure in the absence of preliminary injunctive relief.

What appellant has is a monetary investment in WRG stock. If he has been injured, he can be made whole by an award of money damages. Indeed, the whole premise for appellant's proffer of expert testimony as to the "intrinsic value" of WRG stock is that if appellant had been offered a certain amount for his stock, he would not have been injured.

It is fundamental that no preliminary injunction should issue when money damages would provide an adequate remedy:

> "[I]njunctive relief continues to be viewed as 'extraordinary' and courts are reluctant to award it if the claimant can secure adequate rectification of his grievance by an award of damages." 11 Wright and Miller, *Federal Practice and Procedure*, Civil §2944 at 394 (1973).

Thus, this Court has refrained from granting preliminary injunctions when the appellant could be adequately compensated by money damages. *Sanders* v. *Air Line Ass'n,* 473 F.2d 244, 248 (2d Cir. 1972); *Thompson* v. *New York Central R.R.,* 361 F.2d 137, 145-46 (2d Cir. 1966); *Foundry Services, Inc.* v. *Beneflux Corp.,* 206 F.2d 214, 216 (2d Cir. 1953). In *Thompson, supra,* Judge Medina stated:

> "The motion for a preliminary injunction was properly denied by the District Court for failure to show that irreparable injury would result or that money damages would be insufficient should appellants ultimately prevail. This alone was sufficient basis for denial of the injunction." 361 F.2d at 145-46.

Although there is no Second Circuit decision discussing the adequacy of money damages in the context of a case similar on its facts to this one, several Southern District Judges have applied the general principle enunciated by this Court in declining to enjoin mergers or reorganizations attacked on the ground that the price offered was inadequate. *See Tanzer Economic Associates, Inc.* v. *Haynie,* CCH Fed. Sec. L. Rep. ¶94,873 (S.D.N.Y. 1974) (Frankel, J.); *Voege v. Smith,* 329 F. Supp. 180, 184 (S.D.N.Y. 1971) (Lasker, J.); *Stedman* v. *Storer,* 308 F. Supp. 881, 888-89 (S.D.N.Y. 1969) (Frankel, J.); *Weber* v. *Continental Motors Corp.,* 305 F. Supp. 404, 406 (S.D.N.Y. 1969) (Bonsal, J.). In *Tanzer, supra,* Judge Frankel wrote:

> "In the longer run, should plaintiff prove correct, there is a sufficiently adequate remedy at law. If 'sufficiently adequate' is ungainly English, it is intentional. The remedy is not perfect. If somewhat romanticized, plaintiff's argument that shareholders should not be 'frozen out' of their corporations is not weightless. Money damages will not thaw share-

> holders thus afflicted. But that remedy, on balance, given the estimate of success, seems enough in the circumstances." *Tanzer Economic Associates, Inc.* v. *Haynie,* CCH Fed. Sec. L. Rep. ¶94,873, at 96,980 (S.D.N.Y. 1974).

Appellant has advanced no argument to refute Judge Carter's finding below:

> "Finally, it should be added that even if I am in error as to the reach of the federal securities laws, the plaintiff and the class he represents have an adequate remedy at law. Monetary damages will suffice to make them whole." (735).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed or, in the alternative, the order appealed from should be affirmed.

Dated: New York, New York
February 10, 1975

Respectfully submitted,

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